

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
Northern District

SUPERIOR COURT  
JANUARY TERM 2024

State of New Hampshire

v.

Adam Montgomery

Case No. 216-2022-CR-00020 and  
216-2022-CR-00577

**STATE'S RESPONSE TO DEFENDANT'S MOTION WITHDRAW HIS EARLIER  
ASSENTED TO MOTION FOR JOINDER**

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, in Response to the Defendant's "Motion to Sever", filed this day, January 15, 2024, on the eve of the final pretrial Conference scheduled for tomorrow, January 16, 2024, in which he seeks to withdraw his November 22, 2023 Assented-to Motion for Joinder. The defendant's motion is based solely on his claim that the information within one of the State's recent Zwicker letters, which as the Court knows is common practice during trial preparation, "dramatically" changes the state of the evidence. The defendant's motion fails to disclose that he has been on notice for well over a year about discovery documenting Harmony Montgomery's physical condition in the months and days leading up to her death, as well as the bruises she suffered during that time period. He has had this knowledge since he was first provided discovery and continuing throughout the discovery process over the past 22 months. Kayla Montgomery's recent statements during witness preparation do not "dramatically" change the state of any evidence. They do not mean that the State will withdraw its agreement that the jury must be instructed to consider the charges separately in deliberations.

This being said, the defendant has the right to seek a withdrawal of his motion if he now feels that it would not be in his best interest after having read his discovery more thoroughly. The State files this Response so the Court may understand the full facts at bar before tomorrow's discussion during the final pretrial conference.

THE INDICTMENTS AT ISSUE IN THE DEFENDANT'S CURRENT  
MOTION TO WITHDRAW HIS MOTION FOR JOINDER

1. The defendant was indicted for one count each of second-degree assault, second-degree murder, witness tampering, and falsifying physical evidence. The defendant is also charged with abuse of a corpse. The charges are based on the December 7, 2019, murder of the defendant's 5-year-old child, Harmony Montgomery ("Harmony"), and the March 4, 2020, disposal of her corpse. The charges of falsifying physical evidence and abuse of a corpse are alleged to have occurred between approximately December 7, 2019, and March 4, 2020. The charge of second-degree assault is based on the defendant's July 2019 assault on Harmony. Finally, the defendant is alleged to have tampered with Kayla Montgomery ("Kayla") between December 7, 2019, and January 4, 2022. It is anticipated that at trial multiple individuals will testify that they witnessed Harmony with a black eye following the July 2019 assault, an assault in which the defendant admitted committing. It is also anticipated that multiple witnesses will testify regarding the abuse perpetrated upon Kayla. Kayla is an eyewitness to Harmony's murder and the defendant's actions both immediately before and the events that followed the murder. The defendant filed an Assented-to Motion for Joinder of these offenses back on November 23, 2022.

2. One individual, Kevin Montgomery ("Kevin"), the defendant's uncle, reported when he visited the defendant's home in late July 2019, he observed Harmony with a black

eye. When Kevin asked what happened, the defendant told him that he “bashed her around the house.” He also told Kevin that he “punched her in the face.” This conversation was overheard by Kayla who was in another room of the residence listening. Following the defendant’s conversation with Kevin, she confronted the defendant with the information she heard, and the defendant told her that he caused the injury to Harmony. The defendant previously told her that the injury occurred while Harmony played with her younger brother.

3. Kayla made initial statements regarding her purported knowledge of the July assault, she also made statements regarding Harmony’s murder and the defendant’s extensive coverup. On June 3, 2022, Kayla was arrested for two charges of Perjury based on statements she had made in prior testimony before the Grand Jury for Hillsborough County Northern District. That same day she agreed to be interviewed by law enforcement. During this June 3, 2022 interview, Kayla provided new information about the defendant concerning the July assault and Harmony’s subsequent murder that was contrary to her initial statements, and which inculpated the defendant with respect to the instant case. Kayla subsequently provided two additional interviews; on June 23, 2022, and another on March 16, 2023. In these statements, Kayla corroborated Kevin’s account and provided information regarding Harmony’s murder and coverup.

4. Last Thursday, January 11, 2024, members of the State met with Kayla Montgomery in anticipation of trial, and subsequently sent defense timely notice of three new disclosures that the defendant cites here as grounds to withdraw his motion: (1) that Kayla herself saw the defendant strike Harmony in the week prior to the family becoming homeless (when in her earlier June 3, 2023 proffer, she stated she had not seen any injuries on Harmony until they were homeless); (2) that Kayla disclosed the reason she believes the

defendant cut off contact with Harmony's mother, Crystal Sorey, was because he was bruising Harmony; and (3) that Kayla now described Harmony as skinny and looking exhausted at the time they were living homeless in their car when before she described her weight as 60-65 pounds at that time.

5. The defendant's allegation today that "the state of the evidence has changed dramatically" is misleading, as it implies his reasons for wanting to withdraw his motion stem solely from the newly learned information this past week, which the Court is aware is common in these late stages of trial preparation and that the State was required to send notice of, and that he has been caught unaware of the three disclosures specified in the paragraph above. His motion implies that prior to this last week, he had no notice of testimony on Harmony's physical condition leading up to the time of her death, that the State is seeking admission for Kayla's opinion that the defendant chose to cut off contact with Crystal Sorey was due to his continued custody and treatment of Harmony, and he had no notice of evidence against him regarding Harmony's physical condition at the time of her death. Any claim or suggestion that this is new information is belied by the previous discovery the defendant has had in his possession for 14, or in some instances, 22 months. The State does not disagree that the defendant has the right to seek to withdraw his motion to join if he so chooses, even at this late hour, but his argument that he had no notice of these facts before right now is contrary to the facts previously known to him.

EXAMINING THE DEFENDANT'S REASONS FOR WITHDRAWAL AND  
APPLYING THE LAW ON JOINDER TO THE FACTS AT BAR

**I. The defendant has known of evidence since November 2022 that Harmony had been beaten and suffered bruises the week prior to when the defendant and Kayla became homeless.**

6. Since November 22, 2022, and then again on November 29, 2022, the defendant has been on notice from provided discovery that Kayla reported Harmony had bruises on her

face at the time of their eviction, and continuing on to when the family was involved in a car accident, he caused three years prior on November 29, 2019. One example from that November 2022 discovery disclosure includes Bates pages 5837, in which Tabitha Scott told police that Kayla had reported “Adam hit Harmony in the head multiple times and was abusive to her during the year time span that they had her.” Ms. Scott, a passenger in the car at the time of the crash, saw the defendant trying to cover Harmony up from the eyes of police officers at the November 29, 2019 car accident when they were homeless. This accident was noticed to the defendant months earlier in discovery Bates pages 1235-1239, sent to the defendant prior to March 22, 2022. Ms. Scott elaborated on the Harmony’s injuries in discovery Bates 6105-6115, which again were provided to the defendant over a year before now.

7. Kayla Montgomery’s recent statements can therefore hardly “dramatically” change” the state of the evidence against him, when he’s known for well over a year that the evidence against him includes Kayla and others saying the defendant was abusive towards Harmony leading up to her death, including in the weeks and days leading up to her death. This new statement from Kayla is certainly possible fodder for cross-examine, but the information and allegations are not new, and this changes nothing about the litigation of the pending matters against the defendant.

8. If the defendant is seeking withdrawal of his Motion to Join, his foundation for requesting this withdrawal must lie elsewhere than in receiving additional evidence of a fact he has been on notice of for well over a year; that Kayla Montgomery saw the defendant abuse Harmony multiple times within the year time span he had custody of Harmony leading up to the time of her death.

**II. The defendant misconstrues the State’s notice of Kayla Montgomery’s newly disclosed opinions on why Adam Montgomery cut off contact with Crystal Sorey**

**and why he never bonded with Harmony as the State's theory of the case or as the State intent to seek admission of said opinions.**

9. The defendant also argues that he seeks withdrawal of his motion to join because he “could not have divined” that the State would assert that Adam was assaulting Harmony as early as April 2019 prior to last Thursday’s disclosure. He did not however need to divine anything, because it was in the discovery he presumably reviewed before filing his Motion to Join on November 23, 2022. Even if he did not read the discovery he had in-hand before November 22, 2023, included in those reports were reports by Kayla Montgomery that the defendant was abusing Harmony throughout the year he had custody of her. Bates 5837, *supra above*. He had notice of this allegation since the day before he filed his Motion to Join on November 22, 2022, so no divination was necessary.

10. Moreover, the defendant misconstrues the State providing notice of Kayla’s opinions with the State seeking their admission. His argument that severance is now necessary due in part to this disclosure supposes that the State is seeking admission of Kayla’s opinion on these two facts, which it is not. The disclosure is simple: the State recently learned that, if asked, Kayla believes the reason the defendant cut off contact with Harmony’s mother, Crystal Sorey, is that he was bruising Harmony and his fear that Crystal would report him. The State is not seeking admission of this belief in its case-in-chief, nor is it seeking to amend its response to the defendant’s 404b motion relative to Kayla to permit its introduction in its case-in-chief. It was obligated to disclose this opinion to the defendant, and simply did so. Similarly, the State was obligated to inform the defendant that Kayla now expressed an opinion that the defendant never had a connection to Harmony, and that is the reason he was so aggressive with her. The State is not seeking admission of this opinion in its case-in-chief, nor is it seeking to amend its

response to the defendant's 404b motion relative to Kayla to permit in its case-in-chief. It was obligated to disclose this opinion to the defendant, and simply did so.

11. If the defendant is seeking withdrawal of his Motion to Join, his foundation for requesting this withdrawal must lie elsewhere than in receiving notice of these two newly articulated opinions from Kayla Montgomery, neither of which the State seeks to introduce in its case-in-chief.

**III. The defendant has known of evidence showing Harmony's physical condition and Kayla's disparate statements regarding that condition since March 2022.**

12. Since March of 2022, the defendant has been on notice of Harmony's physical condition in the days and months leading up to both the July 2019 assault and her December 2019 murder. One such example within some of the very first discovery disclosures is Bates pages 307; documents that Harmony looked "malnourished" when she was seen by Lesley Rivera after the family had their power cut off at 77 Gilford Street in the months just prior to Harmony's death. Since November of 2022, the defendant has also been on notice of Harmony's physical condition as seen in July 2019, when he received discovery Bates pages 4821-26 documenting Harmony's weight during a medical appointment in June of 2019.

13. The defendant is correct in stating that during an earlier proffer, Kayla Montgomery estimated Harmony's weight at 60-65 pounds at the time of her death. This conflicted with the other reports, some referenced above, of Harmony being much smaller. The defendant is also correct in stating that he has just received notice that last week Kayla stated Harmony looked skinny and exhausted at the time the defendant committed the murder. Again, this new statement is certainly available for the defendant to cross-examine Kayla regarding her credibility, but it does not "dramatically" change anything about the state of the evidence on

Harmony's physical condition at the time of the murder. The defendant has known for 22 months that Harmony appeared underfed when she was with the defendant, and he's known for well over a year that she was just 35 pounds in June of 2019.

14. If the defendant is seeking withdrawal of his Motion to Join, his foundation for requesting this withdrawal must lie elsewhere than in receiving further evidence of a fact he has been on notice of for nearly two years; that Harmony Montgomery was an undersized child leading up to both the time of her assault in July 2019, and the time of her death later that year. This is especially so when the recent disclosure from Kayla Montgomery only gives him additional material on which to conduct cross-examination.

**IV. Any basis to join or sever the defendant's July 2019 assault on Harmony from his December 2019 murder of Harmony must be based on the law regarding joinder of offenses, and independent of the claims he makes today.**

15. "Superior Court Rule 97-A governs the joinder of criminal offenses and distinguishes between charges that are related and unrelated." *State v. Brown*, 159 N.H. 544, 548 (2009). "When a party moves to join related charges, the trial court is required to join them unless it 'determines that joinder is not in the best interests of justice.'" *Id.* (citing then existing Super. Ct. Crim. R. 97-A(I)(B)). Since the New Hampshire Supreme Court issued *Brown* in 2009, the Superior Court Rule of Criminal Procedure relating to joinder of criminal offenses has changed numbers from 97-A to 20. The rule number has changed, but not the content.

16. Under Rule 20, offenses are considered related if they:

- a. are alleged to have occurred during a single criminal episode; or
- b. constitute parts of a common scheme or plan; or
- c. are alleged to have occurred during separate criminal episodes, but nonetheless, are logically and factually connected in a manner that does not solely demonstrate that the accused has a propensity to engage in criminal conduct.

(emphasis added) Super. Ct. Crim. R. 20(a)(1). “[W]hether offenses that occur during separate criminal episodes are ‘logically and factually connected in a manner that does not solely demonstrate that the accused has a propensity to engage in criminal conduct’ is largely determined by the close relationship among the offenses with respect to both the underlying charged conduct and the evidence to be used to prove the charges.” *Id.* at 551.

17. In the case at bar, there is no evidence that Adam Montgomery assaulting Harmony Montgomery in July of 2019, and his later murder of her in December of 2019, were part of a single criminal episode. There is also no evidence that they were part of a common criminal scheme or plan. This leaves the consideration of whether they are nonetheless logically and factually connected in a manner that does not solely demonstrate that the accused has a propensity to engage in criminal conduct.

18. In *Brown*, the New Hampshire Supreme Court determined that the following five factors determine if charges arising from separate criminal episodes were related; (1) the temporal and spatial relationship among the underlying charges acts; (2) the commonality of the victim(s) and/or participant(s) for the charged offenses; (3) the similarity in the defendant’s mode of operation; (4) the duplication of law regarding the crimes charged; and (5) the duplication of witnesses, testimony and other evidence related to the offenses. *Id.* at 551-552. “No single factor is dispositive on the question of relatedness. Rather, the factors outlined above are intended to serve as guidelines that must be sensibly applied in accord with the purposes of joinder...” *Id.* Looking at these factors in their totality, the State asserts that joinder is supported.

19. The State doesn’t disagree that the temporal and spatial relationship of the criminal acts are separate. The first occurred in July 2019 in the family’s Gilford Street home,

and the second was five months later after they had been evicted and were living in their car. However, the remaining four factors in *Brown* are present here: they involve a common defendant and victim, the defendant physically assaulted Harmony on both occasions with his hands when was angry with her, the laws of assault and murder have running through them the same core concepts of assault and injuries caused by that assault to differing degrees, and the witnesses establishing both crimes are similar. While the defendant's motion is correct in stating that the length of both trials would be different due to the number of witnesses, several of the witnesses (including private citizens, family members, and law enforcement officers) would be the same to establish Harmony's residence, the injuries seen, the aftereffects of the defendant's criminal behavior, and the defendant's intimidation of others in his circle to prevent them from reporting or testifying to what they had witnessed, or as retribution from having done so.

20. "The policy underlying joinder recognizes that the government should not be put to the task of proving what is essentially the same set of facts more than once, and that the defendant should be spared the task of defending more than once against what are essentially the same, or at least connected, charges." *Id.* at 552 (quoting *State v. Ramos*, 149 N.H. 118, 124 (2003) (quotation(s) omitted)). "Thus charges should be tried separately whenever it is deemed appropriate to promote a fair determination of the defendant's guilt or innocence, which includes evaluating whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently to each offense." *Id.* at 555 (quoting *Ramos*, 149 N.H. at 128 (quotations omitted)).

21. Here, the charges may be joined as the evidence, although voluminous, is not complex, and the jury would be instructed on the elements of each charged crime. Thus, a jury would be able to distinguish the evidence and apply the law to each offense.

22. A single trial can also benefit the defendant. There exists a possibility of harassment, trauma, and publicity that multiple trials could produce for the defendant. A single trial would undoubtedly result in a faster disposition of the case against the defendant, because the charges for which he is to face a single trial constitute all with which he may be charged with stemming from his actions towards Harmony.

23. Relevant to the Court's interests of justice analysis, the Court should recognize that separate trials would entail significant duplication and overlap of proof and witnesses. As stated above, all the evidence presented regarding witness tampering against Kayla Montgomery would be duplicated nearly in its entirety in separate trials for assaulting and for later killing Harmony. Given this central commonality of witnesses for the element at trial relevant to Kayla Montgomery's testimony, this is not a case where there may exist an impermissible danger of witness bolstering due to the inclusion of witnesses who otherwise have no bearing on the case. See *Brown*, 159 N.H. at 556.

### CONCLUSION

24. If the Defendant wishes to readdress joinder at this time, he has the right to do so, and the Court may so consider this at tomorrow's hearing. However, the voluminous discovery provided to date, and the dates of that disclosure, undercut his sole claim that his instant motion is due to any surprise or inappropriate actions by the State.

25. Given the importance of the defendant's motion to the remaining issues of scheduling, trial length, procedure, and need for judicial planning during the final pretrial conference tomorrow morning, the State requests that the Court take up this matter first to discuss the underlying rationale for the instant motion. The State stands ready to discuss the defendant's new desire to withdraw his motion, and whether severance should then apply.

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

(A) Hold a hearing on this motion at the pretrial conference scheduled for tomorrow, January 16, 2024; and

(B) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

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January 15, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing was sent to counsel for the defendant via the electronic case filing system.

/s/ Benjamin J. Agati  
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